No. 83-530

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANK THOMPSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in denying petitioner's new trial motion on the ground that the new evidence on which petitioner relied was inadmissible.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 710 F.2d 915. The opinions of the district court (Pet. App. 18a-21a, 22a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1983 (Pet. App. 1a). A petition for rehearing was denied on July 28, 1983 (Pet. App. 36a). The petition for a writ of certiorari was filed on September 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner, a former congressman, was convicted of several offenses arising out of what is known as the Abscam investigation: bribery, in violation of 18 U.S.C. 201(c); accepting

an unlawful gratuity, in violation of 18 U.S.C. 201(g); and conspiracy to defraud the United States and to commit bribery, in violation of 18 U.S.C. 371. He was sentenced to three years' imprisonment and a fine of $20,000. The court of appeals affirmed his conviction (692 F.2d 823 (1982)), and this Court denied certiorari (No. 82-1199 (May 31, 1983)).

Petitioner then moved for a new trial. The district court denied the motion (Pet. App. 18a-21a) and the court of appeals affirmed (*id.* at 1a-17a).[1]

1. The evidence admitted at petitioner's trial is summarized in the opinion affirming his conviction and in our brief in opposition to petitioner's previous petition for a writ of certiorari.[2] Undercover agents, posing as representatives of an Arab sheik seeking assistance with immigration matters, gave a briefcase containing $50,000 to co-conspirator Howard Criden in petitioner's presence. This exchange occurred during a videotaped meeting, and it was both preceded and followed by recorded conversations that showed that petitioner understood that some of the money was intended for him. Criden's law partner testified that Criden gave $20,000 of this money to petitioner.

Petitioner then arranged for a similar transaction involving then-Congressman John Murphy, in which $50,000 was handed to Criden in Murphy's presence;

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[1] The district court had also denied a subsequent motion to supplement the record on appeal (Pet. App. 22a-35a), but the court of appeals allowed the materials under Fed. R. App. P. 10(e) and affirmed the denial of a new trial upon the entire record (Pet. App. 17a).

[2] We filed a consolidated brief in opposition (82-1183 Br. in Opp.) in *Lederer* v. *United States*, No. 82-1183; *Murphy* v. *United States*, No. 82-1187; *Thompson* v. *United States*, No. 82-1199; *Criden* v. *United States*, No. 82-1240; and *Myers* v. *United States*, No. 82-1255.

Criden gave petitioner $10,000 of this money for himself and $15,000 for Murphy. Congressman John Murtha also testified at petitioner's trial that petitioner had told him he could receive $50,000 of the sheik's money in return for assistance in immigration matters. At trial, petitioner denied receiving any of the money and denied any knowledge that money was passed; he claimed that he thought the briefcase transferred in his presence contained only documents. His theory was that Criden had kept all the money, duping both the sheik's representatives and petitioner. Pet. App. 3a-4a; 82-1183 Br. in Opp. 7-10.

2. In his motion for a new trial, petitioner offered evidence that, he asserted, showed that FBI informer Melvin Weinberg, who posed as one of the sheik's representatives, had received a kickback from the target of another aspect of the Abscam investigation. In an Abscam operation distinct from that involving petitioner, an FBI agent transferred $100,000 of the sheik's money to Angelo Errichetti, then mayor of Camden, New Jersey, in the presence of Kenneth N. MacDonald, then vice-chairman of the New Jersey Casino Control Commission. This payment resulted in an indictment against MacDonald, alleging that MacDonald knew some of the money was an unlawful payment intended for him. MacDonald died before trial of the charges against him. Pet. App. 5a. Errichetti was indicted and convicted for his role in still other phases of the Abscam investigation (see 82-1183 Br. in Opp. 2-6).

The principal evidence petitioner submitted in support of his motion for a new trial was an affidavit executed by Weinberg's wife long after petitioner was convicted. In it she recounted an episode in which she drove her husband to a meeting with Errichetti. According to the affidavit, Weinberg met Errichetti and returned with a briefcase, which he patted, saying "forty-five." The affidavit further stated that Weinberg

said he had "ducked" the FBI agent who was supposed to be watching him, so that the agent did not know about this meeting. Pet. App. 5a, 61a-62a. In addition to the affidavit, petitioner submitted an FBI report of an interview with Joseph DiLorenzo, Errichetti's nephew and chauffeur, who told of driving Errichetti to a meeting with Weinberg on the day after the FBI agent had handed Errichetti the briefcase containing $100,000 in MacDonald's presence (*id.* at 6a).

Petitioner asserts that if this evidence had been available to him, he would have argued that Weinberg had conspired with Errichetti to deceive both the other undercover agents and MacDonald. Such a showing, petitioner contends, would have enabled him to base his defense on the theory that Weinberg had also conspired with Criden to deceive petitioner. In seeking a new trial, petitioner introduced memoranda from the files of his trial counsel that, he said, showed that they considered advancing such a theory but abandoned it. See Pet. 5-6; Pet. App. 7a-8a, 19a, 28a-29a.[3]

3. The district court denied petitioner's motion for a new trial. The court characterized petitioner's new evidence as "not strong" (Pet. App. 31a) but assumed that it showed that "Weinberg and Errichetti shared the MacDonald bribe money" (*id.* at 28a). But, the court ruled, had this evidence been offered at the trial, it would have been excluded under Fed. R. Evid. 403 on the ground that its probative force was too slight—it did not even "bear directly on the guilt or innocence of" petitioner (Pet. App. 31a)—and it required too extensive an inquiry into collateral matters. The court explained that "[i]n order * * * fully [to] present the

[3] Petitioner also sought a new trial on the basis of evidence that Weinberg had received gifts from Errichetti. This evidence was apparently intended to challenge Weinberg's credibility. Petitioner appears now to have abandoned any contention arising from these gifts. See page 8 note 4, *infra*.

claim about MacDonald that [petitioner] now advances, it would have been necessary to try the entire MacDonald case, a prospect which would have involved many days if not weeks of testimony, and which would have involved a large number of additional tapes" (Pet. App. 31a). The district court also reasoned that since petitioner's trial defense was that he was deceived by one person—and that defense was unsuccessful—there was little reason to believe that petitioner would have succeeded if he had urged that he was in fact deceived by two persons (*id.* at 20a).

The court of appeals affirmed. It first noted several weaknesses in the evidence petitioner introduced in support of his motion for a new trial. For example, Mrs. Weinberg's account of the meeting differed from DiLorenzo's in important respects, and the affidavit of Mrs. Weinberg, who died shortly after executing it, may have been inadmissible. Moreover, the affidavit of petitioner's trial counsel carefully did *not* assert that counsel would have altered his defense theory if he had the evidence in question; it stated only that that evidence provided a "significantly stronger basis" for the theory on which petitioner now relies. Pet. App. 6a, 8a & nn.3, 4, 6. The court of appeals also noted (*id.* at 15a n.11) that petitioner's evidence might have been excludable under Fed. R. Evid. 404(b), because it was evidence of other acts offered "to prove the character of a person"—Weinberg—"in order to show that he acted in conformity therewith."

But the court of appeals then left aside these difficulties and ruled that, in any event, the district court had not erred. The court of appeals explained (Pet. App. 14a-15a):

> We agree with Judge Pratt [the district judge] that the evidence in support of this claim does not warrant a new trial for the fundamental reason that it would not be admissible. Judge Pratt, hav-

> ing presided at [petitioner's] trial, was in the best position to make the assessment required by Rule 403. As he concluded, the probative force of the new evidence is not substantial. It may show * * * that Weinberg received a portion of the $100,000 MacDonald payment. But it does not show that MacDonald did not receive some of that money and it leaves entirely to conjecture the claim that MacDonald was duped * * *. It is entirely too speculative to move from the claim that Weinberg received a kickback (itself a matter of sharp dispute), to the claim that Weinberg and Errichetti duped MacDonald, and then to the ultimate claim that Weinberg and Criden (without Errichetti) duped [petitioner].

ARGUMENT

1. Petitioner relies indiscriminately on various pieces of evidence that, he asserts, show that Weinberg received a kickback from Errichetti. But petitioner does not explain the theory on which these pieces of evidence entitle him to relief. For example, the district court (Pet. App. 20a) rejected petitioner's contention that he is entitled to relief under the usual standards governing a motion for a new trial based on newly discovered evidence, and petitioner does not appear to renew this contention.

Similarly, petitioner appears to have contended in the courts below that the government had an obligation to disclose evidence that Weinberg shared in the MacDonald money because it revealed that the government knew petitioner was innocent. But Mrs. Weinberg's affidavit was not in the government's possession—indeed, it did not even exist—before the trial. The only supposedly exculpatory evidence that petitioner asserts was in the government's possession was DiLorenzo's statement and evidence that Weinberg had attempted to manufacture an alibi for the time he was allegedly meeting Errichetti (see Pet. 11-13). As the

court of appeals explained, it is wholly implausible to contend that this evidence was so exculpatory that the government was obligated to reveal it (Pet. App. 16a):

> It remains a matter of dispute whether Weinberg met with Errichetti * * * and ever received a kickback from him. It is fanciful to suggest that the Government knew or should have known that such a meeting occurred, that "therefore" a kickback was received, that "therefore" MacDonald was duped, and that "therefore" [petitioner] was duped. Neither prior to [petitioner's] trial, nor since, is there any basis to believe that any of the evidence against him was known to the prosecution to be false, or was false at all.

Petitioner now appears to have abandoned this contention as well.

Petitioner's sole contention now is that he is entitled to relief because defense counsel, before trial, requested "information * * * relating to * * * any violations or suspected violations of federal or state law by Melvin Weinberg" (Pet. App. 55a), and the government did not disclose the DiLorenzo statement. But it is far from clear that petitioner's request, reasonably interpreted, reach DiLorenzo's statement. The government disclosed information about Weinberg's criminal background (see 82-1183 Br. in Opp. 25), and it was not immediately apparent that DiLorenzo's statement fell into the same category of "information relating to violations of law." Moreover, petitioner's trial strategy gave government attorneys no reason to believe that petitioner was seeking evidence like the DiLorenzo statement. Finally, as petitioner concedes (Pet. 11 n.2), the DiLorenzo statement was disclosed in time for petitioner to use it at the post-trial proceedings on his motion to set aside the conviction, but petitioner chose not to use it. In these circumstances, the courts below did not err in concluding that the government acted improperly in not disclosing this information before trial.

2. But the more fundamental difficulty with all of petitioner's contentions is that petitioner completely fails to address the principal basis of the decision below—that none of the evidence on which petitioner now relies would have been admitted at his trial even if it had been available then. Even if that evidence demonstrated that Weinberg shared the MacDonald money with Errichetti, the mere showing that Weinberg received a kickback would be of no help to petitioner; it would not in any way suggest that petitioner was any less guilty.[4] Even on petitioner's own theory, he would first have to make the further showings that MacDonald did not also share in the payment and that McDonald was "duped" and did not intend to sell his influence.

As the court of appeals noted, "the complicated and often contradictory evidence concerning the MacDonald payment * * * abundantly supports Judge Pratt's conclusion that [petitioner's] current claim would have required trial of the entire MacDonald case" (Pet. App. 15a). Moreover, petitioner identifies no substantial evidence tending to show that McDonald received none of the money. Indeed, the Senate Select Committee report, portions of which petitioner also introduced in support of his motion for a new trial (see Pet. App. 9a), concluded that while Weinberg shared some of the MacDonald payment, MacDonald himself knowingly exchanged his influence for the undercover agents' cash (see *id.* at 32a-33a).

Even beyond that, as both courts below noted, even if petitioner somehow showed not only that Weinberg received a kickback but that MacDonald was deceived by Weinberg and Errichetti and was not corrupt, peti-

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[4] As both courts below noted, and as petitioner appears not to dispute, petitioner's conviction did not rest on Weinberg's testimony (Pet. App. 13a, 33a-34a); thus a general challenge to Weinberg's credibility would not have aided petitioner.

tioner would then have to show that Weinberg engineered the same scheme with Criden. He would *then* have to show that petitioner did not share in the money with Weinberg and Criden.[5] And even that would not be sufficient unless petitioner did not know that money was transferred to Criden in exchange for his services.[6]

In these circumstances, this Court plainly should not review the district court's highly discretionary determination, emphatically endorsed by the court of appeals, that the evidence petitioner now offers would not have been admitted at trial because its probative value was "substantially outweighed by the danger of * * * confusion of the issues * * * [and] by considerations of undue delay [and] waste of time" (Fed. R. Evid. 403). Petitioner's extended discussion of whether *United States* v. *Agurs*, 427 U.S. 97 (1976), and *Brady* v. *Maryland*, 373 U.S. 83 (1963), require that he be granted relief overlooks the fact that a fundamental holding of those cases is that even an inexcusable failure to disclose evidence does not entitle a defendant to relief if the evidence would not have been admissible at trial. See 373 U.S. at 90-91; 427 U.S. at 105-106.

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[5] The Senate Select Committee report relied on by petitioner recounts Criden's testimony that he did indeed give portions of the two $50,000 payments to petitioner (Pet. App. 16a n.13).

[6] Petitioner also does not explain how his new theory can be reconciled with Congressman Murtha's testimony that petitioner told him $50,000 could be earned by helping the sheik with immigration problems.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983